Flying Dutchman Park, Inc. *and* Toby Kelly

Teamsters Automotive Employees Local Union No. 665, affiliated with International Brotherhood of Teamsters, AFL–CIO *and* Toby Kelly. Cases 20–CA–26331, 20–CA–26403, and 20–CB–9761

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On November 9, 1995, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Union each filed exceptions and supporting briefs and the Respondent Employer filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The issue presented in Case 20–CA–26403 is whether the Respondent Employer (the Respondent) violated Section 8(a)(5) and (1) of the Act by failing and refusing to sign a contract submitted to it for execution by the Union.[3] As the judge explained, Section 8(d) of the Act requires the parties to a collective-bargaining relationship, once they have reached agreement on the terms of a collective-bargaining contract, to execute that contract at the request of either party. A failure to do so constitutes a violation of Section 8(a)(5) of the Act. Initially, the judge found that the parties had reached oral agreement on a new contract prior to the Union's request that the Respondent sign a written version of the agreement. The judge further found, however, that the contract contained an unlawful clause in its union-security provision. Without further analysis, the judge found, in effect, that the one unlawful clause voided the entire contract. Accordingly, the judge concluded that he could not require the Respondent to execute the agreement and recommended that the complaint in Case 20–CA–26403 be dismissed. For the reasons set out below, we agree with the judge that the contract clause at issue here was unlawful, but disagree with his further finding that this one unlawful clause voided the entire contract. Finally, since we also find that the Respondent was obligated to execute the agreed-on collective-bargaining agreement, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the contract.

The judge has fully set out the facts. In brief, the Respondent and the Union had a collective-bargaining relationship for at least 12 years prior to the events at issue here. The parties' last collective-bargaining agreement expired in September 1993. Thereafter, the Respondent's president, James Vierling, met with Richard Rodriguez, the Union's vice president and chief negotiator, on seven or eight occasions to negotiate a new contract. Ray Vetterlein, the Respondent's labor consultant, was present at some of those meetings. Prior to the parties' last meeting on August 18, 1994,[4] Vierling was concerned about three issues: wages, holidays, and inclusion of language in the contract that would limit the contract's application to the city and county of San Francisco. At the August 18 meeting, Vierling and Rodriguez resolved these issues and reached agreement on a new contract. Rodriguez agreed to reduce the oral agreement to writing. The written agreement contained the following clause in its union-security provision:

> When an Employee is engaged outside of the Union office, he shall be required to obtain a referral from the Union before starting to work.

The union-security provision of the expired contract also contained this clause.[5]

On August 23, Ernie Yates, the Union's president, faxed a copy of the agreement to Vierling. Vierling then

[1] The Respondent Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge incorrectly cited *Acme Tile & Terrazzo Co.,* 318 NLRB 425 (1995), in his decision.

[2] The Order contains remedial provisions that are in accord with our decision in *Indian Hills Health Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.,* 325 NLRB 17 (1997).

[3] In Cases 20–CA–26331 and 20–CB–9761, we adopt the judge's findings, to which there were no exceptions, that the Respondent Employer and the Respondent Union violated the Act by enforcing union-security and dues-checkoff provisions in the absence of a collective-bargaining agreement lawfully containing such provisions and that the Respondent Employer violated Sec. 8(a)(1) by threatening employees with discharge if they did not join the Union at a time when no bargaining agreement had been agreed to and executed.

[4] All dates hereafter refer to 1994 unless otherwise stated.

[5] The union-security provisions of the expired contract and the proposed contract are identical and read as follows:

> *SECTION 1: HIRING OF EMPLOYEES*:
>
> Only members in good standing in the Union shall be retained in employment. For the purposes of this Section, "member in good standing" shall be defined to mean employee members of the Union who tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.
>
> All employees covered by this Agreement shall become members of the Union within thirty-one (31) days from the effective date of the Agreement or within thirty-one (31) days from the date of employment, whichever is later, and shall remain members of the Union in good standing as a condition of continued employment.
>
> The Employer shall be the sole judge of the competency and fitness of the Employee. When an Employee is engaged outside of the Union office, he shall be required to obtain a referrral [sic] from the Union before starting to work.

called Rodriguez to complain that the August 23 agreement did not contain the agreed-on language limiting the contract's application to the city and county of San Francisco. This was Vierling's only objection to the contract. On August 25, Rodriguez faxed Vierling a corrected copy of the agreement that included the jurisdictional language requested by Vierling. Also on August 25, the Respondent and the Union received copies of a decertification petition which employee Toby Kelly had filed with the Board on August 23. On August 26, Vierling sent Vetterlein a copy of the contract. In his cover letter, Vierling stated that the contract was "straight forward" and asked Vetterlein whether he should sign the agreement given the filing of the decertification petition. Thereafter, the Respondent refused to sign the agreement.

We agree with the judge that the parties reached agreement on a new contract on August 18 and that the written agreement faxed to Vierling on August 25 conformed to the terms of the August 18 oral agreement. We also agree with the judge that the Respondent's objections to signing the agreement arose only after it obtained knowledge of the decertification petition. As to these objections, the Respondent now asserts that it was not obligated to execute the contract because the union-security clause set out above was unlawful and voided the entire contract. The Respondent also now asserts that it was not obligated to execute the agreement because it had, in effect, a good-faith doubt of the Union's continuing majority status based on the filing of the decertification petition and the fact that less than a majority of the unit employees were union members. Because, as explained above, the judge found merit in the Respondent's former argument and dismissed the complaint on that basis, he did not address the Respondent's latter argument in his decision. We shall now consider these arguments in turn.

Initially, contrary to our dissenting colleague, we agree with the judge, for the reasons stated by him, that the union-security clause was unlawful on its face. More specifically, because the collective-bargaining agreement does not provide for an exclusive hiring hall arrangement with the Union, the contractual provision requiring employees "engaged outside of the Union office" to obtain a "referral from the Union before starting to work" is unlawful on its face. Even if, as our colleague contends, the term "referral" does not require an employee to become a *union member* before starting to work, it clearly requires, by its ordinary meaning, that an employee is required to obtain an approval or clearance from the Union before actually beginning to work. On this basis alone, the provision is unlawful on its face. See *Acme Tile & Terrazzo Co.*, 318 NLRB 425, 428 fn. 11 (1995), affd. 87 F.3d 558 (1st Cir. 1996).

Further, we disagree with our dissenting colleague's assertion that "extrinsic evidence" supports her contention that the union-security clause was lawful. Our colleague relies on the testimony of Union President Rodriguez that the Union never proposed or urged on the Respondent any interpretation of the union-security clause that would require newly hired employees to become members of the Union or to obtain the Union's approval before starting to work. However, the record also contains a February 4, 1994 letter from the Union's attorney to the Respondent's negotiator, Ray Vetterlein, which contrasts with Rodriguez' testimony. The letter states that its purpose is to "confirm the following understanding" reached at the February 2, 1994 bargaining session:

> The Employer agrees to interpret the Union's security clause to require that the employees be sent to the Union for clearance and [that] they obtain that clearance before they are put to work. The employer agrees that if it should violate that provision there will be a $100.00 penalty for each such violation.

Thus, Rodriguez' testimony notwithstanding, the record establishes that the Union proposed that the union-security clause be interpreted to require that new employees get "clearance" from the Union before starting to work. We see no real substantive distinction between clearance and approval.

Our dissenting colleague also relies on contractual language which states that "the Employer shall be the sole judge of the competency and fitness of the Employee." That language, however, does not persuade us that the union-security clause is lawful. The Respondent may well be the sole judge of competency and fitness, but, by the express terms of the union-security clause, the Union must nevertheless add its approval before an employee—no matter how competent or fit—is permitted to start working. Thus, the above "competency and fitness" language in the contract simply clarifies that the Union's approval or disapproval of employees before they start work will not turn on an assessment by the Union of their competency and fitness.

Our colleague also argues that the required referral is not a condition precedent to being hired, but is at most a condition precedent only to actually starting to work. Even if this is so, the fact remains that, under the express terms of the union-security clause, newly hired employees cannot actually start to work until they obtain the contractually required "referral" from the Union. In the absence of an exclusive hiring hall arrangement, we do not think that the Union can impose this condition precedent to starting work.

Finally, our dissenting colleague attempts to save this provision by imputing to the *term* "referral" a special meaning in accord with "what the Union contends is its lawful intent." We have already found that extrinsic evidence about the Union's intent does not compel a finding that the intent was lawful. But, even assuming a lawful intent as our colleague contends, the issue in this case is

whether the clause violates Sections 8(a)(1) and (b)(1)(A). That turns on whether the clause reasonably tends to restrain or coerce employees in the exercise of protected rights. *Boilermakers Local 686 (Boiler Tube Co. of America)*, 267 NLRB 1057, 1057 (1983); see *Acme Tile & Terrazo Co.*, supra at 427 fn. 7 (in determining whether employer's statements to employees that they must obtain a "referral" from the union violated Section 8(a)(1), Board applies an objective test). This is an objective test which necessarily involves inquiry into the plain meaning of the words of the clause, and how employees would reasonably interpret it. See *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983). Unless a contrary intent has clearly been communicated to employees and applicants for employment, therefore, evidence as to the parties' intent is of no avail in resolving the issue of whether the clause is unlawful on its face. In this case, we find that prospective employees reasonably could interpret this clause as a restraint on their Section 7 right to choose or refrain from union membership or support.

For the reasons set forth above, we agree with the judge that the union-security clause is unlawful on its face. We further find, however, that the judge erred in finding that the inclusion of the unlawful clause in the contract justified the Respondent's refusal to sign the agreement. The judge failed to consider in his analysis whether the Respondent's refusal to sign the contract was motivated by the presence of the unlawful clause in the contract or by other considerations. In cases where a contract contains an unlawful provision, but the employer's refusal to sign the contract is motivated by reasons other than the presence of the unlawful provision in the contract, the Board requires the employer to execute the contract with the unlawful provision deleted. See, e.g., *Tulsa Sheet Metal Works*, 149 NLRB 1487, 1488 (1964), enfd. 367 F.2d 55 (10th Cir. 1966), and *Custom Sheet Metal & Service Co.,* 243 NLRB 1102, 1109–1110 (1979), enf. denied 666 F.2d 454 (10th Cir. 1981).

In the present case, as the judge himself observed, the Respondent's objections to signing the agreement arose only after the decertification petition was filed. As set out above, on August 26 Vierling advised Vetterlein that the contract submitted for execution on August 25 was straightforward and explained that his only concern was whether he should sign the contract in light of the filing of the decertification petition on August 23. Thus, it is clear that Vierling's refusal to sign the contract was not motivated by the fact that it contained an unlawful clause. Indeed, that Vierling's refusal to execute the agreement was motivated by factors other than the presence of the unlawful clause in the proposed contract is underscored by the fact that although the expired agreement contained the same unlawful provision, Vierling had never objected to its inclusion in that contract nor sought its removal from the proposed contract during negotiations. "This indicates that the objections [based on the illegal clause] were merely afterthoughts and may not therefore stand as defenses to the 8(a)(5) allegation." *Custom Sheet Metal & Service Co.,* supra at 1110.

Having found that the inclusion of the unlawful clause in the contract does not justify the Respondent's refusal to execute the contract, we now address the issue of whether the unlawful clause so permeates the contract as to render the entire contract unenforceable.[6] This issue need not detain us long. For in cases where the Board has found a union-security provision unlawful because it did not provide newly hired employees the legally established grace period in which to become union members, the Board has not found that such a provision so permeates a contract as to render the contract unenforceable. See *Royal Components*, *Inc.*, 317 NLRB 971, 972 (1995). We likewise decline to make such a finding here where the clause in question is "not basic to the whole scheme of the contract, and there is no provision that the contract is 'integrated' or that its respective sections are 'interdependent.'" *NLRB v. Tulsa Sheet Metal Works*, 367 F.2d at 59.[7] For all these reasons, we reverse the judge and find that the inclusion of the illegal clause in the contract did not justify the Respondent's refusal to execute the agreement.

As to its second defense, the Respondent asserts that it also was not obligated to execute the contract on or after August 25 because it had a good-faith doubt about the Union's continued majority support among the unit employees. In support of its asserted good-faith doubt, the Respondent relies on both (1) the precontract circumstance that only a minority of the unit employees were

[6] An employer is not obligated to execute a contract which contains an illegal provision or provisions that so permeate the contract as to render it unenforceable. As the 10th Circuit explained in *NLRB v. Tulsa Sheet Metal Works*, 367 F.2d 55, 59 (1966):

> We are, of course, mindful that not all provisions of a collective bargaining agreement are severable. But employment contracts should not be completely obliterated because some provisions are beyond the legal limits of the parties' bargaining power, unless such illegal provisions permeate the complete contract to such an extent as to affect its enforceability entirely. *NLRB v. Rockaway News Co*., 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832.

[7] Cf. *NLRB v. Custom Sheet Metal Service*, 666 F.2d 454, 459–461 (1981), where the 10th Circuit reversed the Board's finding that an employer who was no longer engaged in the construction industry was obligated to execute the contract between the employer association and the union. The court found, inter alia, that a provision included in the contract which limited employment to those with "'minimum training or experience qualifications' (i.e., journeyman and apprentice sheet metal workers—Article III)" was unlawful because the respondent was not engaged in the construction industry. The court also found that this unlawful provision permeated the contract to such an extent as to render the contract unenforceable. In this regard, the court stated that "[i]f any provision of a collective bargaining agreement is truly vital, it is a provision pertaining to the classification of employees, and this seems especially true when the wage scale in a contract is directly tied to the classification scheme." Id. at 460. By contrast, although the court also found that the contract contained an unlawful 8-day union-security clause (art. V), the court did not find that this provision permeated the contract.

actually members of the Union, and (2) the postcontract filing of the decertification petition. More specifically, the Respondent was aware, during contract negotiations before its August 18 final agreement with the Union on the terms of the new contract, that only a minority of the unit employees were actually members of the Union. The August 23 decertification petition was, of course, filed after the parties' August 18 final agreement on their contract. The Respondent received a copy of the decertification petition on August 25—the same day it received the corrected copy of the final agreed-on contract from the Union for signature.

We find that the Respondent was not permitted to assert a good-faith doubt about the Union's continued majority status based on either of the above circumstances following the August 18 agreement on a new collective-bargaining agreement. When an employer asserts a good-faith doubt about an incumbent union's continued majority status based on events—including the filing of a decertification petition—occurring after final agreement on the substantive terms of a collective-bargaining agreement, an employer may not lawfully refuse to bargain. This is true regardless of the status of any written instrument incorporating such agreement.[8] As the Board stated in *Auciello Iron Works*:[9]

> We affirm the rule set forth in *North Bros. Ford* that a union's acceptance of an employer's outstanding contract offer precludes the employer from raising a good-faith doubt of the union's majority status based on events occurring *after* acceptance. Thus, the employer's good-faith doubt based on subsequent events is not available to defend a refusal to execute a valid agreement or a withdrawal of recognition.

Thus, the Respondent could not refuse to execute the agreed-on contract on the asserted basis of a good-faith doubt about the Union's continued majority status where the asserted doubt was based, at least in part, on a decertification petition filed *after* the parties reached final agreement on August 18.

The Respondent cannot circumvent this rule on the grounds that its asserted good-faith doubt is also based, at least in part, on pre-August 18 grounds—the fact that only a minority of the unit employees were actually members of the Union. The Supreme Court has rejected such preagreement grounds for post-agreement assertions of good-faith doubt of a union's continued majority status. In *Auciello Iron Works, Inc. v. NLRB*, supra, the Court held that an employer violates Section 8(a)(5) and (1) by refusing to execute an agreed-on collective-bargaining agreement because of an asserted good-faith doubt about a union's continued majority status when the asserted doubt arises from facts known to the employer before the union accepted the employer's contract offer. The Court noted that a union is entitled under Board precedent to a conclusive presumption of continued majority status during the term of a collective-bargaining agreement, up to 3 years.[10] The Court particularly rejected the notion that an employer's repudiation of a contract might be justified because its doubt of the union's majority status was expressed very soon after—even as little as 1 day after—the employer and the union agreed on a contract.[11] In sum, the Court held that the precontractual good-faith doubt about the union's continued majority status was not adequate to support an exception to the conclusive presumption of continued majority support for the union arising "at the moment" a collective-bargaining contract offer has been accepted.[12]

Applying these principles here, the fact that only a minority of the unit employees were actually members of the Union was known to the Respondent Employer *before* August 18. The Respondent nonetheless reached agreement with the Union on August 18 and did not repudiate the agreement until a week later. Under *Auciello*, supra, the Respondent could not lawfully refuse to execute the agreed-on contract on the asserted basis of a good-faith doubt deriving, at least in part, from minority membership in the Union among unit employees which the Respondent was aware of before the parties agreed to the contract.

Accordingly, in light of the above considerations, we find that the Respondent could not lawfully rely on a good-faith doubt about the Union's continued majority status as a basis for refusing to execute the August 18 collective-bargaining agreement, regardless of whether that asserted doubt was based on circumstances that existed before the parties reached agreement on their contract, or events that occurred after it.[13] Consequently, we

[8] *North Bros. Ford*, 220 NLRB 1021, 1022 (1975); *Highland Hospital*, 288 NLRB 750, 760 (1988), enfd. 861 F.2d 56 (2d Cir. 1988); and *Bennett Packaging*, 285 NLRB 602, 608 (1987).

[9] 317 NLRB 364, 368 (1995) (emphasis in original), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 517 U.S. 781 (1996).

[10] 517 U.S. at 786, citing *NLRB v. Burns Security Services*, 406 NLRB 272, 290 fn. 12 (1972).

[11] 517 U.S. at 788. Thus, the Court found that, under the Act, an employer has adequate courses of action available to it to act on any doubts about a union's continued majority status that the employer may have prior to reaching agreement with the union on a collective-bargaining agreement. Specifically, the Court found that an employer harboring such a doubt during contract negotiations, but prior to agreement, could withdraw its outstanding contract offer and then either (1) petition the Board for a representation election under Sec. 9(c)(1)(B) of the Act; (2) withdraw recognition of the union based on its doubt, and then rely on that doubt to defend against any subsequent unfair labor practice charge alleging unlawful withdrawal of recognition; or (3) further investigate the circumstances giving rise to its doubt, while nevertheless continuing to bargain in good faith with the union. Id. at 788–789.

[12] Id. at 791–792.

[13] In view of our finding that the Respondent is not permitted to assert a good-faith doubt, we make no findings as to whether the evidence cited by the Respondent would have been, in other circumstances, sufficient to establish a good-faith doubt as to the Union's majority status.

find that the Respondent violated Section 8(a)(5) and (1) of the Act, as alleged, by refusing to execute the parties' collective-bargaining agreement.

AMENDED CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with loss of employment for not complying with a union-security clause at a time when there was no collective-bargaining agreement in effect lawfully containing such a clause, Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By enforcing union-security and dues-checkoff provisions in the absence of a collective-bargaining agreement lawfully containing such a clause, Respondent Employer engaged in unfair labor practices in violation of Section 8(a)(1), (2), and (3) of the Act and Respondent Union engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act.

5. By refusing to sign the contract submitted to it for execution by the Union on August 25, 1994, the Respondent Employer violated Section 8(a)(5) and (1) of the Act.

6. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent Employer and the Respondent Union violated Section 8(a)(1), (2), and (3), and Section 8(b)(1)(A) and (2) respectively, we shall order them to cease and desist, and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, we shall order the Respondents to reimburse, with interest, any employees who tendered dues and/or fees between June 2 and September 30, 1994. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp*., 231 NLRB 651 (1977). Further, having found that the Respondent Employer violated Section 8(a)(5) and (1) by refusing to execute the agreed-on contract, we shall order the Respondent Employer to execute that agreement, with the unlawful union-security clause deleted, and to give retroactive effect to that agreement. We shall also order the Respondent Employer to make whole its employees for any loss of earnings that they may have suffered as a result of its failure to execute the collective-bargaining agreement on August 25, 1994. Backpay, if any, is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). Nothing here is to be construed as requiring the Respondent to recoup wages or benefits already received by its employees.

ORDER

The National Labor Relations Board orders that

A. Respondent Teamsters Automotive Employees Union Local No. 665, affiliated with International Brotherhood of Teamsters, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Enforcing a union-security clause or dues-checkoff provision with Flying Dutchman Park in the absence of a collective-bargaining agreement lawfully containing such a clause.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent that it has not already done so, make whole employees for all dues and fees unlawfully withheld from them with interest as provided in the "Amended Remedy" section of this decision.

(b) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached notice marked "Appendix A."[14] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Flying Dutchman Park, Inc., if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent Flying Dutchman Park, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of employment for not complying with a union-security clause at a time when there is no collective-bargaining agreement in effect lawfully containing such a clause.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Enforcing a union-security clause or dues-checkoff provision with Teamsters Automotive Employees Local Union No. 665, in the absence of a collective-bargaining agreement lawfully containing such a clause.

(c) Refusing to execute and give effect to the collective-bargaining agreement agreed to by the Respondent Employer and Teamsters Automotive Employees Local Union No. 665 on August 18, 1994, except to the extent specified below.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement submitted to it by Teamsters Automotive Employees Local Union No. 665 on August 25, 1994, except that the agreement shall not contain the union-security clause found unlawful.

(b) Abide by all the terms of the collective-bargaining agreement entered into with Teamsters Automotive Employees Local Union No. 665 and give retroactive effect to its terms.

(c) Make whole its employees in the manner set forth in the "Amended Remedy" section of this decision, for any loss of pay which they may have suffered by reason of the Respondent Employer's refusal to execute and give effect to the collective-bargaining agreement agreed to by the parties on August 18, 1994, restoring whatever rights and privileges they may have lost by reason of the Respondent Employer's failure to execute and give effect to the agreement.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its San Francisco, California facility copies of the attached notice marked "Appendix B."[15] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER FOX, concurring and dissenting in part.

I agree with my colleagues in every respect except that I would not find that the union-security clause contained in the agreed-on collective-bargaining agreement is unlawful on its face. In my view, the reference to the requirement of obtaining a "referral" from the Union does not, in context, mandate either that employees must be approved by the Union before they are hired or that they must join the Union before they can lawfully be required to under the 8(a)(3) proviso. The referral requirement applies to employees who have been "engaged outside of the Union office" and merely requires that they obtain the referral before actually "starting to work." This is entirely consistent with what the Union contends is its lawful intent: to ensure that the Union knows who is on the Respondent's payroll and their date of hire. The clause by its terms operates in circumstances where the hiring or "engagement" of the employee has already occurred; and its specification that employees "become members of the Union . . . within thirty-one (31) days from the date of employment" (with membership defined in terms of payment of dues and initiation fees) makes clear that the "referral" requirement is not a requirement that employees join the Union before they begin work. The collective-bargaining agreement also states that "the Employer shall be the sole judge of the competency and fitness of the employees," thereby making clear that the Union has no ability to veto the Employer's hiring decisions.

In construing a clause that is alleged to unlawfully encourage union membership, we must begin with the Supreme Court's statement in *NLRB v. News Syndicate,* 365 U.S. 695, 699 (1961), that "we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress." As the Court made clear in that case, illegal objects will not be presumed, and contracts will not be found unlawful merely because they fail to disclaim all illegal objects. See also *Teamsters Local 357 v. NLRB*, 356 U.S. 667 (1961). That a union-security clause may contain terms that are ambiguous is not a basis for finding the clause to be unlawful on its face. See *Electronic Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1993), enf. denied on other grounds 41 F.3d 1532 (D.C. Cir. 1994). Rather, in construing such clauses, as in other contract interpretation matters,

[15] See fn. 14, above.

> the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks to both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.

Mining Specialists, 314 NLRB 268, 268–269 (1994) (footnotes omitted).

My reading of the clause as having a lawful purpose is supported not only by the language of the clause, but also by extrinsic evidence in the record as to how the clause has been implemented by the parties in the past. The language of the union-security clause is identical to the language of the union-security clause in the prior, expired agreement between the parties. However, there is no evidence that the clause was ever unlawfully applied to require newly hired employees either to become members of the Union or to obtain approval from the Union before going to work. To the contrary, the Union's president testified without contradiction that the Union had never proposed or urged on the Respondent any such interpretation of the union-security clause, that employees were in fact hired and allowed to go work without first joining or being approved by the Union, and that the Union never sought to take any action against those employees.

In sum, the contractual clause at issue here contains express provisions making clear that employees are not required to be or become union members until they have been employed for 30 days and disavowing any role for the Union in approving or disapproving employees selected by the Employer for hire. The record reflects that the clause has been applied in a lawful manner in the past. Under these circumstances, I am unable to conclude that the clause can only by construed to have the unlawful purpose ascribed to it by my colleagues and therefore must be found to be unlawful on its face.

Regardless of the legality of the union-security clause, however, it was not a ground on which the Respondent declined to execute the contract. Thus, even accepting the judge's reading of the clause, I agree with my colleagues that the inclusion of the clause in the contract did not justify the Respondent's refusal to execute the contract. I also agree that *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996), is controlling, and that the Respondent was not privileged to refuse to execute the agreement because of its asserted good-faith doubt about the Union's continued majority status. Accordingly, I agree with my colleagues that the Respondent Employer has violated Section 8(a)(5) and (1) in the respects stated. I would not, however, as part of the amended remedy, direct that the union-security clause be deleted from the agreement the Respondent is required to execute.

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enforce a union-security clause or dues-checkoff provision with Flying Dutchman Park in the absences of a collective-bargaining agreement lawfully containing such a clause.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole employees for all dues and fees unlawfully withheld from them, with interest.

TEAMSTERS AUTOMOTIVE EMPLOYEES LOCAL
UNION NO. 665

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid and protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of employment for not complying with a union-security clause at a time when such a clause is not lawfully in effect.

WE WILL NOT enforce a union-security clause or dues-checkoff provision with Teamsters Automotive Employees Local Union No. 665, in the absence of a collective-bargaining agreement lawfully containing such a clause.

WE WILL NOT refuse to execute and give effect to the collective-bargaining agreement whose terms we agreed to with Teamsters Automotive Employees Local Union No. 665 on August 18, 1994.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL execute and give retroactive effect to the collective-bargaining agreement submitted to us for execution by Teamsters Automotive Employees Local Union No. 665 on August 25, 1994, except that the agreement shall not contain the clause of the union-security provision found unlawful.

WE WILL make whole our employees for any loss incurred as a result of our unlawful enforcement of the union-security and dues-checkoff provisions, with interest; and WE WILL make whole our employees for any loss of pay which they may have suffered by reason of our refusal to execute and give effect to the collective-bargaining agreement whose terms we agreed to with Teamsters Automotive Employees Local Union No. 665 on August 18, 1994, with interest; and WE WILL restore whatever rights and privileges our employees may have lost by reason of our failure to execute and give effect to the agreement.

FLYING DUTCHMAN PARK, INC.

Lucille Rosen, Esq., for the General Counsel.

Richard Harrington, Esq. (Chandler, Wood, Harrington & Maffly), of San Francisco, California, and *Raymond H. Veterlein (Labor Relations Associates),* of San Francisco, California, for the Employer.

David Rosenfeld and *Antonio Ruiz, Esqs. (Van Bourg Weinberg, Roger & Rosenfeld*), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these cases in trial at San Francisco, California, on July 27, 1995. On September 20, 1994, Toby Kelly, an individual (Kelly), filed the charge in Case 20–CA–26331 alleging that Flying Dutchman Park, Inc. (Respondent Employer or the Employer) committed certain violations of Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act). That same date, Kelly filed a charge in Case 20–CB–9761 alleging that Teamsters Automotive Employees Local Union No. 665, affiliated with International Brotherhood of Teamsters, AFL–CIO (Respondent Union or the Union) committed certain violations of Section 8(b)(1)(A) and (2) of the Act. On December 28, 1994, the Acting Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondents, alleging that Respondent Employer violated Section 8(a)(3), (2), and (1) of the Act and Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by unlawfully enforcing the union-security and dues-checkoff provisions in the absence of a written collective-bargaining agreement. Respondent Union filed a timely answer to the complaint, denying all wrongdoing. Respondent Employer admitted the allegations of the complaint.

On November 8, 1994, the Union filed a charge against the Employer in Case 20–CA–26403 alleging that the Employer violated Section 8(a)(5) and (1) of the Act by failing and refusing to sign an agreed-on contract. A separate complaint issued in that case on December 28, 1994. Both complaints were consolidated for trial. Respondent Employer filed an answer and amended answer in Case 20–CA–26403 denying the allegations of the complaint and raising certain affirmative defenses.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the post hearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a California corporation with an office and principal place of business located in San Francisco, California, where it is engaged in providing valet parking services for commercial institutions and private parties.

During calendar year 1993, the Employer provided services in excess of $50,000 to enterprises within the State of California, which enterprises meet the Board's standards for asserting jurisdiction on a direct basis. Accordingly, Respondent-Employer admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Both Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Union-Security and Dues-Checkoff Provisions

1. The facts

The facts in Cases 20–CA–26331 and 20–CB–9761 are not in dispute. Respondent Union has been party to a series of collective-bargaining agreements with the Respondent Employer for approximately 12 years. The most recent agreement between the Union and the Employer expired by its terms on September 1, 1993. The parties have not yet executed a successor agreement. In Case 20–CA–26403, the General Counsel contends that the parties reached agreement on a successor collective-bargaining agreement in August 1994. The agreement which expired in September 1993, contained a union-security provision. However, after the expiration of the agreement in September 1993 the parties continued to enforce the union-security and union-checkoff provisions of the expired agreement. The union-security and dues-checkoff provisions were enforced in the absence of any written collective-bargaining agreement.

On June 2, 1994, the Respondent Union and the Employer agreed to enforce the union-security clause and ensure that every employee became a member of the Union on or before June 17. On June 7, the Employer wrote the Union furnishing a list of all the unit employees and stating, "Upon subsequent written notification from the Union that any employees are not members of Local 665 or in the process of becoming members of local 665, we will see that they are terminated." On June 22, the Employer advised its employees "we have agreed upon a Union shop provision with Local 665 that requires any [sic] and all employees who have worked 30 days or more to become and remain members of the Union in good standing as a condition of employment." On or about September 30, 1994, Respondent Employer ceased withholding union fees and dues from its employees and stopped transmitting such moneys to Respondent Union. On September 30, 1994, during the pendency of these cases, the Employer's representative wrote the Union stating, "We had deducted dues and initiation fees at

your written request when there was not a signed collective bargaining agreement containing a checkoff clause."

2. Analysis

The obligation to pay dues under a union-security provision accrues from the date of the execution of the collective-bargaining agreement. *Hampton Merchants Assn.*, 151 NLRB 1307 (1965); *Safeway Stores*, 111 NLRB 968 (1955); and *Sterling Precision Corp.*, 131 NLRB 1229 (1961). The Board has held that a union-security clause does not survive the expiration of a contract and cannot be enforced after the contract has expired. *Auto Workers Local 376 (Emhart Industries)*, 278 NLRB 285 (1986). See also *Teamsters Local 25 (Tech Weld Corp.)*, 220 NLRB 76 (1975).

The execution of a dues-checkoff authorization must be voluntary. *Air La Carte*, 284 NLRB 471, (1987). The dues authorization may be lawful for a fixed period of time so long as the employee may revoke at least once per year and at the termination of any collective-bargaining agreement. *NLRB v. Postal Service*, 827 F.2d 548 (9th Cir. 1987); *Frito-Lay*, 243 NLRB 137 (1979). Dues checkoff does not survive expiration of a contract. *Linton Business Systems v. NLRB*, 501 U.S. 190 (1991); *Indiana & Michigan Electric Co*., 284 NLRB 53, 55 (1987); and *Petroleum Maintenance Co.*, 290 NLRB 462 (1988). See also *Geo. C. Christopher & Son*, 290 NLRB 472 (1988).

In this case, Respondent Employer, pursuant to an agreement with Respondent Union, unlawfully advised employees that they would be fired if they did not join Respondent Union at a time when no bargaining agreement had been agreed to and executed. The parties further enforced dues checkoff in the absence of a valid agreement and valid authorizations from the employees. *Cleveland Typographical Union Local 53 (Plain Dealer Publishing Co.)*, 225 NLRB 1281 at 1284 (1976); *Teamsters Local 25 (Tech. Weld Corp.),* supra; and *Namm's Inc.*, 102 NLRB 466 (1953).

B. The Alleged Refusal to Sign an Agreed-on Contract

1. Facts

In this case, the General Counsel and the Union allege that Respondent Employer and the Union reached agreement on a new collective-bargaining agreement on August 18, 1994, and that Respondent Employer has failed and refused to execute a written contract embodying the terms of that collective bargaining agreement. Respondent Employer contends that the parties did not reach complete agreement on a new collective-bargaining agreement. Further, Respondent Employer contends that the Union did not represent a majority of bargaining unit employees and, therefore, it would be inappropriate to order the Respondent Employer to sign and abide by the collective-bargaining agreement.

The Union and Employer have had a collective-bargaining relationship for at least 12 years. James G. Vierling, Respondent Employer's president, has personally participated in the negotiation of collective-bargaining agreements with the Union, including the negotiations for a successor agreement to the contract which expired September 1993. The Employer met with the Union on seven or eight occasions, sometimes with the assistance of the Employer's labor consultant and sometimes without. Prior to the meeting of August 18, Vierling was concerned with three issues: contract language limiting the contract to the city and county of San Francisco; wages; and holidays. These issues were resolved on August 18, according to both Vierling and Richard Rodriguez, the Union's vice president and negotiator.[1] Although other issues had been raised by Vierling's labor consultant, the credited evidence reveals that on August 18 Vierling reached agreement with Rodriguez and Rodriguez agreed to reduce the agreement to writing.

On August 23, Ernie Yates, the Union's president, faxed a copy of the contract to Vierling. Vierling called Rodriguez and complained that the proffered contract did not contain language limiting the contract to the city and county of San Francisco. Rodriguez agreed to make the change. The Union had never opposed so limiting the contract but had never submitted a written limitation to Vierling. The jurisdictional clause was the only objection Vierling raised to the contract. On August 25, Rodriguez faxed Vierling a corrected copy of the contract with the jurisdictional clause limiting the contract to the city and county of San Francisco. On August 26, Vierling sent a copy of the contract to Ray Vetterlein, his labor consultant, stating that the contract was "straight forward" and asking whether he should sign the agreement given the filing of the decertification petition. On August 23, Kelly had filed a decertification petition with the Board. That petition was received by the Union and Respondent Employer on August 25. Vierling's covering letter to Vetterlein in no way indicated that he had not reached agreement with the Union or that the proffered contract differed from his agreement with the Union. Thereafter, Respondent Employer refused to sign the agreement and continues to refuse to sign the agreement.

2. Analysis

Section 8(d) of the Act explicitly requires the parties to a collective bargaining relationship to execute "a written contract incorporating any agreement reached if requested by either party." *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). "When an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and a failure or refusal to do so constitutes" a violation of Section 8(a)(5) of the Act. *Liberty Pavilion Nursing Home*, 259 NLRB 1249 (1982); and *Interprint Co.*, 273 NLRB 1863 (1985). "It is well established that technical rules of contract do not control whether a collective bargaining agreement has been reached." *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981). Rather, the crucial inquiry is whether there "is conduct manifesting an intention to abide and be bound by the terms of an agreement." *Capital-Husting Co., Inc. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982).

In determining whether underlying oral agreement has been reached, the Board is not strictly bound by technical rules of contract law but is free to use general contract principles adapted to the bargaining context. *Americana Healthcare Center*, 273 NLRB 1728 (1985). The burden of proof is on the party alleging the existence of the contract. *Cherry Valley Apartments, Inc.*, 292 NLRB 38 (1988).

Here the undisputed credible evidence establishes that after seven or eight bargaining sessions, Vierling reached agreement with the Union on a new collective-bargaining agreement on August 18. The Union furnished Vierling a copy of the agreed-on contract. Vierling called the Union and objected to the fail-

[1] Respondent's labor consultant had raised other issues during negotiations. However, Vierling apparently dropped those other issues when the Union acceded to his demands on jurisdiction, wages, and holidays.

ure to restrict the contract to the city and county of San Francisco. The Union agreed to correct the written agreement to conform to the agreement of the parties. A corrected collective-bargaining agreement was forwarded to Respondent Employer. However, before the Employer executed the agreement, the employees filed a decertification petition. Vierling sought advice from his labor consultant as to whether or not he should sign the agreement in light of the petition. Vierling did not tell either his consultant or the Union that no agreement had been reached. I find, therefore, that agreement had been reached on August 18 and that the written agreement faxed to Vierling on August 25 conformed to the oral agreement reached on August 18. Respondent's objections to the agreement arose only after it obtained knowledge of the decertification agreement.

3. Alleged unlawful union-security clause

Respondent Employer contends that the union-security clause of the new agreement is unlawful and, therefore, makes the agreement void. The Employer states that the following language makes the agreement unlawful:

> When an Employee is engaged outside of the Union office, he shall be required to obtain a referral from the Union before starting to work.

In *Acme Tile & Terrazo Co.*, 318 NLRB 425 (1995), the Board held that the respondent employers' requirement that employees obtain a "referral," "approval," or "clearance" from the bricklayers union was "tantamount to requiring immediate membership" in the union. The Board pointed out in footnote 11:

> We note that even if the Respondent Employers did not require their employees to actually become members of the Bricklayers Union by April 3 as a condition of employment, the violation is nevertheless established. In our view employees cannot be required to obtain 'approval' or 'clearance' as a condition of employment in the absence of an exclusive hiring hall agreement. *Carpenters Local 2396 (Tri-State Obayashi)*, 287 NLRB 760, 762 (1987) enfd. mem. 878 F.2d 1439 (9th Cir. 1989).

In *Carpenters Local 2396*, supra, the Board held that, absent an exclusive hiring hall arrangement, a union violates Section 8(b)(1)(A) and (2) if it interferes or attempts to interfere with an individual's employment for union-related reasons. Further, by maintaining a union-security agreement which is unlawful on its face, a union violates Section 8(b)(1)(A). The mere maintainance of such an ageement violates Section 8(b)(1)(A); if the clause is enforced, the union also violates Section 8(b)(2).

In the instant case, there is no exclusive hiring hall provided for in the contract. Nonetheless, the union-security clause requires employees to obtain a referral from the Union. Such a union-security clause is unlawful on its face under *Acme Tile & Terrazzo*. Accordingly, although Respondent Employer had agreed to such a contract, I cannot require the Respondent Employer to execute the agreement. Therefore, I must recommend dismissal of the complaint in Case 20–CA–26403.

CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening employees with discharge for refusing to pay periodic dues to Respondent Union during a time they were not contracted to do so, Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By enforcing a union-security clause conditioning employment on membership in Respondent Union, in the absence of a collective-bargaining agreement containing such a valid union-security clause, Respondent Employer engaged in unfair labor practices in violation of Section 8(a)(1), (2), and (3) of the Act and Respondent Union engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2).
5. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. The union-security clause in the agreement reached on August 18, 1994, is unlawful under the Act. Accordingly, Respondent Employer cannot be ordered to execute the agreement.

THE REMEDY

Having found that Respondents engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effecuate the policies of the Act. Specifically I shall require Respondents to reimburse with interest any employee who tendered dues and/or fees between June 2 and September 30, 1994. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]